BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

BONNIE KEELER,	)	
	)	
Employee/Grievant,	)	
	)	**DOCKET No. 08-10-430**
v.	)	
	)	
DEPARTMENT OF TRANSPORTATION,	)	
	)	**DECISION AND ORDER**
	)	
Employer/Respondent.	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board ("the Board") at 9:00 a.m. on June 24, 2009 in the Delaware Room at the Public Archives Building, 121 Duke of York Street, Dover, DE 19901.

BEFORE Brenda C. Phillips, Chair, John F. Schmutz, Martha K. Austin. and Paul R. Houck, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Roy S. Shiels, Esquire
on behalf of Bonnie Keeler

Frederick H. Schranck
Deputy Attorney General
on behalf of the Department of Transportation

BRIEF SUMMARY OF THE EVIDENCE

The Board introduced into evidence without objection the trial book of the Department of Transportation ("DelDot") with twenty exhibits (A through H, H-1, H-2 and I through R).

DelDot called four witnesses: Wendy L. Carey; Michael O. McCann; Barbara A. Murphy; and Cindy A. King.

The Board did not hear evidence from the employee/grievant, Bonnie Keeler ("Keeler"). After DelDot rested its case, the Board deliberated whether DelDot had proved just cause for Keeler's termination by a preponderance of the evidence. "'To require that the party not having the burden of proof to go forward, when the hearing officer is unpersuaded by the case presented by the party bearing such burden, would be a futile exercise.'" *Christman v. Department of Health & Social Services*, MERB Docket No. 04-06-307 (May 28, 2008) (quoting *Koo v. Kentucky Department for Adult & Technical Education*, 919 S.W.2d 531, 533 (Ky. App. 1996)).

FINDINGS OF FACT

Prior to termination, Keeler worked as an Administrative Specialist I with the Division of Motor Vehicles ("DMV").

Keeler had a history of progressive discipline for tardiness and absenteeism (letter of concern, written reprimand, and several suspensions) going back to January 2007. By letter dated February 4, 2008, Keeler's supervisor notified her: "You have been absence [*sic*] from work 17.75 hours since the beginning of 2008. The level of your absenteeism is considered excessive and I am recommending you be suspended for fifteen (15) days without pay."

On March 14, 2008, Keeler signed a Memorandum of Understanding and Agreement with DelDot/DMV ("the MOU"). Keeler agreed to a five day actual suspension and a ten day "paper" suspension. Paragraph 6 of the MOU provided: "Bonnie Keeler understands that any further incidents of unauthorized or unapproved absences will result in her immediate dismissal." Paragraph 7 provided: "Any further incidents of this type that caused this 'Memorandum of Understanding' shall be construed as warranting termination for cause."

By letter dated June 11, 2008, Cindy King advised Keeler that "since signing the MOU, you have incurred several incidents of unauthorized and unapproved tardiness and absence as listed below:

4/17/08	5 minutes tardy
5/6/08	5 minutes tardy
5/9/08	1 hour tardy
6/2/08	left 4.5 hours early

None of these incidents were authorized or approved. It is apparent to me that you have blatantly violated the MOU. By copy of this letter, I am recommending that your employment with the division be terminated immediately." [1]

By letter dated July 18, 2008, the Secretary of DelDot terminated Keeler effective immediately for violating the MOU. "Item # 6 of the MOU states, 'Bonnie Keeler understands that any further incidents of unauthorized or unapproved absences will result in her immediate dismissal.' Despite signing the MOU, you have had further instances of unauthorized and

---

[1] The Step 3 hearing officer decided that Keeler had a valid medical reason (migraine) for leaving work early on June 2, 2008 and provided a note from her doctor. At the hearing, DelDot agreed that decision "is final and binding upon agency management," Merit Rule 18.8, so the Board will not take that fourth incident into account in deciding whether DelDot had just cause to terminate Keeler.

unapproved absences."

CONCLUSIONS OF LAW

Merit Rule 12.1 provides:

> **Employees shall be held accountable for their conduct. Disciplinary measures up to and including dismissal shall be taken only for just cause. "Just cause" means that management has sufficient reasons for imposing accountability. Just cause requires: showing that the employee has committed the charged offense; offering specified due process rights specified in this chapter; and imposing a penalty appropriate in the circumstances.**

At the start of the hearing, Keeler's counsel asked for clarification from DelDot about the grounds for Keeler's termination. DelDot's counsel stipulated that the grounds for termination were Keeler's violations of the MOU (as opposed to her history of attendance issues prior to the MOU). The threshold issue for the Board to decide is whether Keeler violated the MOU.

Paragraph 6 of the MOU provided: "Bonnie Keeler understands that any further incidents of unauthorized or unapproved absences will result in her immediate termination." The key term is "absences."

The DMV Attendance Policy submitted by DelDot into evidence distinguishes between absences and tardiness. Section 1.2 provides: "The term 'unscheduled absence' (UA) means every absence from work except as approved in advance by the appropriate supervisor. The term 'unscheduled tardiness' (UT) means lateness of any duration in arriving at one's duty assignment except when approved or scheduled in advance with supervisor." Section 1.4 provides: "The term UT shall mean tardiness in the beginning of the scheduled workday."

Mr. McCann testified that this Policy was in effect during Keeler's progressive discipline in 2007 for attendance violations, but that DMV retired the policy in January 2008 so it was not in effect when Keeler signed the MOU on March 14, 2008. DelDot, however, did not provide the Board with a current attendance policy to show that DMV no longer distinguishes between unauthorized absences and tardiness. The Board believes that – given their ordinary meaning – the two terms denote different situations. Tardiness is showing up for work late. Absent is not showing up for work at all or leaving early without authorization.

DelDot argued that Paragraph 6 of the MOU should be construed together with Paragraph 7: "Any further incidents of this type that caused this 'Memorandum of Understanding' shall be construed as warranting termination for cause." DelDot construes "incidents of this type" to refer to Keeler's history of attendance problems, including both tardiness and absenteeism, which led up to the MOU.

The Board could just as reasonably construe the term "incidents of this type" as referring back to Paragraph 6 of the MOU ("unauthorized or unapproved absences") so as not to include tardiness. Indeed, the fifteen -day suspension Keeler accepted in the MOU was not for tardiness but for absenteeism. *See* Letter dated February 4, 2008 from Wendy Longacre to Keeler ("You have been absence [*sic*] from work 17.75 hours since the beginning of 2008. The level of your absenteeism is considered excessive and I am recommending you be suspended for fifteen (15) days without pay.").

At best, the MOU is ambiguous. "It is a well-accepted principle that ambiguities in a contract should be resolved against the drafter." *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 398 (Del. 1996) (citing *Restatement (Second) of Contracts* §206 (1981)). This is particularly

true where "'these provisions could easily have been made clear.'" *Twin City Fire Insurance Co. v. Delaware Racing Association*, 840 A.2d 624, 630 (Del. 2003) (quoting *Kaiser Aluminum*, 681 A.2d at 399).

Mr. McCann testified that he drafted the MOU. He could have made its provisions clear to include not only "unauthorized or unapproved absences" but also tardiness, consistent with the distinction between those two terms in DMV's attendance policy. This may have been an oversight, but it created an ambiguity which "shall be construed against the drafter." *Twin City*, 840 A.2d at 630.

The Board concludes as a matter of law that DelDot did not have just cause to terminate Keeler because she did not commit the charged offense: violating the MOU. The MOU provided that "any further incidents of unauthorized or unapproved absences will result in her immediate dismissal." Keeler's three further incidents of tardiness were not "unauthorized or unapproved absences." [2]

As the remedy for this violation of the Merit Rules, DelDot shall reinstate Keeler to her position as Administrative Specialist I at DMV with back pay and benefits from the effective date of her termination (July 18, 2008) until the date of the Board hearing (June 24, 2009) **LESS** any wages or benefits from employment she received during that time (for example, unemployment

---

[2] Even if Keeler violated the MOU, the Board does not believe termination was an appropriate penalty under the circumstances. Employers can and should expect employees to show up for work on time, but the Board does not find Keeler's tardiness excessive. In the fifteen months prior to the MOU, Keeler had five instances of unscheduled tardiness (ranging from two to five minutes). Two of the three instances after the MOU were for five minutes.

benefits). [3]

The parties are to exchange the necessary information to see if they can agree to the amount of the back pay award. If and when the parties reach an agreement on the back pay award, they are to notify the Board's Administrator in writing. If they cannot agree, either party may petition the Board for a further evidentiary hearing. The Board's Decision and Order may not be final for purposes of appeal if the parties cannot agree on the amount of back pay. *See Officer of Auditor of Accounts v. Ford*, 1987 WL 1811, at p.2 (Del. Super., Oct. 2, 1987) (Martin, J.).

---

[3] Keeler did not ask for interest, but the Board notes that it does not have statutory authority to award interest on back pay. *See Department of Health & Social Services v. Crossan*, 424 A.2d 3, 5 (Del. 1980).

ORDER

It is this 22nd day of July, 2009, by a unanimous vote of 4-0, the Decision and Order of the Board to grant Keeler's appeal.

Brenda C. Phillips
Chair

Paul R. Houck
Member

Martha K. Austin
Member

John C. Schmutz
Member

APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

> (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
>
> (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
>
> (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
>
> (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: August 10, 2009

Distribution:
Original: File
Copies: Grievant
Agency's Representative
Board Counsel

I:\TUPMAN\FILES\MERB.keeler.DelDot.wpd